

Is Procedural Due Process in a Remote Processing Center a Contradiction in Terms?

Gandarillas-Zambrana v. Board of Immigration Appeals

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I. INTRODUCTION

Oakdale, Louisiana is a small town of 6,837 people.¹ The Immigration and Naturalization Service (INS) Federal Detention Center in Oakdale holds one thousand immigrants, and the Oakdale Federal Corrections Institution holds three hundred immigrants.² These immigrants are in Oakdale because aliens,³ even legal permanent resident aliens, who are convicted of crimes are deportable.⁴ The INS transfers immigrants to this remote detention center to expedite their removal.⁵ Once moved to the Oakdale facility, indigent

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¹ See THE WORLD ALMANAC AND BOOK OF FACTS 1995, at 398 (1990 census figures).

² These numbers are approximate and were provided to the author. Telephone interview with Russ Bergeron, INS Press Information Officer (Jan. 18, 1996).

³ This Case Comment will use the terms "alien" and "immigrant" interchangeably, although some commentators find the term alien derogatory or stigmatizing, and others find the term immigrant overbroad or confusing. This Case Comment seeks to avoid both sets of criticisms by treating the words identically.

⁴ 8 U.S.C. § 1182(a)(2) (1994) lists criminal and related grounds for exclusion. Additionally, 8 U.S.C. § 1251(a)(2) lists criminal grounds for deportation. For an explanation of the distinction between exclusion and deportation in immigration law, see *infra* notes 30-36 and accompanying text.

In the current anti-immigrant political climate, state officials are working together with federal officials to speed the deportation of aliens convicted of crimes. See Stanley Mailman, *Early Parole for Deportation and the Right to a Lawyer*, N.Y. L.J., Oct. 23, 1995, at 3.

⁵ On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act into law. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (hereinafter AEDPA). The Act makes significant and harsh changes in immigration law. It provides, in pertinent part:

Any final order of deportation against any alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(ii)(B), (C), or (D),

immigrants have virtually no opportunity to obtain counsel.

Immigrants in deportation and exclusion proceedings have a right to counsel at no expense to the government,⁶ and the immigration judge is required to give the immigrant a list of low cost legal providers.⁷ But in

or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

AEDPA, §440(a)(10) (1996).

Not only does the Act purport to cut off judicial review, but it significantly curtails the availability of 212(c) relief. The Act eliminates 212(c) relief for any alien who is

deportable by reason of having committed any criminal offense covered in sections 241(a)(2)(A)(iii)[aggravated felony]; 241(a)(2)(B)[controlled substances]; 241(a)(2)(C)[firearm offenses]; 241(a)(2)(D)[miscellaneous crimes]; or any offense covered by section 241(a)(2)(A)(ii)[multiple criminal convictions] for which both predicate offenses are covered by section 241(a)(2)(A)(i)[crimes of moral turpitude].

AEDPA § 440(d)(1996)(bracketed information added by the author).

The President and Congress have been planning to streamline the removal of immigrants convicted of crimes for some time. "The President's directive of February 7, 1995 to Executive Departments and Agencies calls for . . . further expediting the identification and removal of criminal aliens." *Containing Costs of Incarceration of Federal Prisoners and Detainees: Prisons and Related Issues: Hearings Before the Subcomm. on Commerce, State, and Justice of the House Appropriations Comm.*, 104th Cong. 1062-63 (1995) (testimony of James A. Puleo, Executive Associate Commissioner for Programs at the INS). Puleo reports that "in FY [fiscal year] 1994 the INS deported 21,992 criminal aliens. We expect to double the number of criminal aliens deported in FY 1996, increasing the number to over 58,000." *Id.* In addition, the budget proposal for 1996 calls for "an additional 1,836 non INS detention beds in state, local, and contract facilities, as well as 976 beds in INS Service Processing Centers—a 48% increase in bed space over FY 1995." *Removal of Criminal and Illegal Aliens: Hearings Before the Subcomm. on Immigration and Claims*, 104th Cong. 14 (1995) (testimony of Alexander Aleinikoff, General Counsel, INS).

⁶ Immigrants have "the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." Immigration and Nationality Act, 8 C.F.R. §§ 242, 292 (1995), 8 U.S.C. [hereinafter INA] §§ 1252, 1362 (1994).

⁷ 8 C.F.R. § 242.1(c) provides that the Attorney General shall compile lists (updated not less than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 292a. Such lists shall be made generally available. *See id.*

In addition, 8 C.F.R. § 292a.1 provides that

[d]istrict directors and officers-in-charge shall maintain a current list of organizations qualified under this part . . . , located within their respective jurisdictions, for the

Oakdale, that list contains just twelve private attorneys⁸ and only two free providers.⁹ Many of the attorneys are located out of town and take as few as one pro bono case a month.¹⁰ There is a paucity of free legal services for immigrants in Oakdale, and as a result, the right to counsel is illusory.¹¹

Nelson Gandarillas-Zambrana is one of the thousands of immigrants that have been incarcerated at the Oakdale facility. He was transferred from his home in Virginia (just outside of Washington, D.C.) to the Oakdale facility, over one thousand miles away from his family, friends, employer, and others who could have helped him obtain an attorney.¹² His case presented this question: does the INS violate the Due Process Clause of the Fifth Amendment by the arbitrary change of venue for a deportation hearing to a location where the alien has no contacts and little opportunity to obtain counsel and present evidence?¹³ In *Gandarillas-Zambrana v. Board of Immigration Appeals*,¹⁴ the

purpose of providing aliens in deportation or exclusion proceedings with a list of such organizations as prescribed in this chapter.

However, in 1982, Congress forbade Legal Services Corporation (LSC) grantees (legal aid offices) from helping most immigrants. *See* 45 C.F.R. § 1626.4 (1995). So, immigrants are for the most part limited to non-LSC organizations, pro bono attorneys, and LSC organizations that are able to separately fund their immigration representation. *See id.* § 1626.3(b)(3).

⁸ Craig Wilson, David A. Barnett, and Kerry Bretz are located in New York City; Alfred Zucara, Jr. and Kenneth Panzer are located in Florida; R. Travis Douglas is an Arizona attorney; Saundra D. Alessi is in Baton Rouge, Louisiana; Leo Jerome Lahey is in Lafayette, Louisiana; and only three lawyers on the list are actually in Oakdale, Louisiana: Todd Nesom, Joel G. Davis, and Jose W. Vega.

⁹ The two free providers are the New Orleans Pro Bono Project (two hundred miles away) and the Farmworkers Legal Assistance Project of Lafayette (sixty miles away and restricted to documented farmworkers only). The list is on file with the author and is also available from the Office of the Immigration Judge at P.O. Box 750, Oakdale, Louisiana 71463.

¹⁰ Telephone interview with Jose Vega (Jan. 8, 1996) (attorney on the list); telephone interview with Todd Nesom (Jan. 9, 1996) (same).

¹¹ Nationally, approximately 78% of detainees at service processing centers go unrepresented. *See* 170 George Anderson, *Defending the Immigrant: Legal Aid Organizations*, 170 AMERICA 17, 19 (1994) (citing a 1992 U.S. Government Accounting Office study). The Immigration Court in Oakdale does not keep records of the number of unrepresented cases, nor can they venture an estimate. Telephone interview with Jackie Y. Ballard, supervisor at the Immigration Court (Feb. 5, 1996).

¹² *See Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1253-54 (4th Cir.), *cert. denied*, 116 S. Ct. 49 (1995).

¹³ *See id.* at 1256. The case also raised the question whether the immigration judge had abused his discretion by improperly weighing the positive equities in the case. *See id.* at

Fourth Circuit answered that question in the negative, and the Supreme Court denied certiorari.

This Case Comment will address the reality of the situation faced by immigrants transferred to remote processing centers. *Gandarillas-Zambrana* will serve as an example of how the INS practice of arbitrary transfers deprives aliens of their right to procedural due process. This Case Comment will show that the right to counsel is rendered a legal fiction when the INS can arbitrarily transfer aliens wherever it chooses.

Part II discusses Supreme Court jurisprudence recognizing the due process rights of aliens. Section A begins with background information on the roots of the due process rights of aliens. Then, Section B explains the modern view of due process that is influenced by the balancing test used in other areas of administrative law. Section C focuses on the importance of the right to counsel as a procedural right. Section D explains that the constitutional mandate of procedural due process is reflected in the statutory right to counsel, and thus the statute must be read more expansively.

In Part III, the facts of the *Gandarillas-Zambrana* case are explained. Then, the Fourth Circuit's reasoning is explained. In Part IV, the Fourth Circuit's opinion is analyzed in light of the immigrant's right to meaningful due process. The court could have followed the Supreme Court's balancing test, it could have read the statute more expansively, and it could have taken this opportunity to clarify just what process is due to resident aliens. Instead, *Gandarillas-Zambrana* illustrates our courts' failure to live up to the promise of fundamental fairness. The INS transfers violate procedural due process and statutory rights by effectively preventing access to counsel, evidence, and witnesses. This Case Comment suggests that a fair proceeding must be held somewhere with a nexus to the immigrant's life.

II. THE GRADUAL RECOGNITION OF IMMIGRANTS' RIGHTS

A. Plenary Power, Procedural Due Process, and the Old Line

Immigration law has been described as a "never-never land,"¹⁵ a "constitutional oddity,"¹⁶ a place where courts resort to "phantom norms,"¹⁷

1257. However, this part of the opinion is beyond the scope of this Case Comment. Instead, this Case Comment will focus on the arbitrary change of venue and access to counsel issues.

¹⁴ 44 F.3d 1251 (4th Cir.), cert. denied, 116 S. Ct. 49 (1995).

¹⁵ Kikuyo Matsumoto-Power, Comment, *Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of the Immigration and Nationality Act*, 15 U. HAW. L. REV. 61, 61 (1993).

¹⁶ Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional*

and the "neglected stepchild of our public law."¹⁸ Immigration has attained this dubious status because of the "plenary power" doctrine. The Supreme Court has stated that "over no conceivable subject is the legislative power of Congress more complete"¹⁹

Congress and the Executive have traditionally had plenary power over the area of immigration, and judicial review of constitutional claims has traditionally been very deferential.²⁰ This extreme deference to Congress led to harsh results for immigrants for many years. In 1889, the plenary power doctrine was born in a case that upheld a racially discriminatory law that prevented longtime resident aliens from returning to the United States.²¹ The Court reasoned that federal immigration policy was a nonjusticiable political question and abdicated review.²²

The reason for the plenary power doctrine is not self-evident in the Constitution. Congress has the authority to devise a uniform rule of naturalization,²³ but the exceptional deference toward Congress was a judge-made doctrine. Various theories have been advanced to support the plenary power doctrine, such as the political question doctrine, the guest theory, and the sovereignty theory.²⁴

Power, 1984 SUP. CT. REV. 255, 255.

¹⁷ Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

¹⁸ Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1631 (1992).

¹⁹ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). Congress enacted the Immigration and Nationality Act (INA) in 1952, and the latest comprehensive changes were made in 1990. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

Congress has delegated its authority to the Executive branch, and the Attorney General is in charge of the INS, the Board of Immigration Appeals (BIA), and the Executive Office for Immigration Review (EOIR). See INA § 1103(a) (1994), 8 C.F.R. § 103(a) (1995). The INS and the EOIR are separate administrative agencies within the Department of Justice.

²⁰ The constitutional right addressed by this Case Comment is the due process right of the Fifth Amendment, which provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V.

²¹ See *The Chinese Exclusion Case*, a.k.a. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). This case also stands for the proposition that when a statute is later in time than a treaty, the statute will prevail. See *id.* at 600. An 1880 treaty between China and the United States would have allowed the laborers to return to the United States. See *id.* at 596.

²² See *id.* at 606. The Court stated that congressional decisions were "conclusive upon the judiciary." *Id.*

²³ See U.S. CONST., art. I, § 8, cl. 4.

²⁴ For a thorough explanation and criticism of each of the rationales for plenary

According to the political question doctrine, immigration law involves foreign affairs, and thus the judiciary should leave it to the political branches.²⁵ The guest theory tries to justify judicial abdication of review by characterizing the immigrant as a guest with no claim to the host's constitutional protections.²⁶ Finally, according to the sovereignty rationale, control of the borders is an inherent right of the sovereign state.²⁷ Thus, exercise of that authority should be free of any strictures, even constitutional limitations.²⁸ The plenary power doctrine has been roundly criticized despite these rationales. As Professor Motomura explains,

I fully accept the view that the constitutional community must have boundaries to establish itself in the first place. . . . and outsiders may justifiably not enjoy the full incidents of membership My objection to the plenary power doctrine is not that it functions to limit entry to our community, but rather that it represents . . . a place in which the usual rules no longer apply.²⁹

Even under the old line of plenary power cases, immigration law made a distinction between aliens subject to exclusion proceedings and those subject to deportation proceedings.³⁰ The distinction hinges on the legal fiction of "entry."³¹ Aliens who have not yet entered are excludable, whereas aliens who

power, see Legomsky, *supra* note 16, at 305 (predicting that the plenary power doctrine "will be frankly disavowed" as soon as judges recognize that the doctrinal theories cannot be defended).

This Case Comment will not attempt an exhaustive critique of these rationales, but only mentions that these are tenuous reasons to abdicate judicial review of the individual deportation case. As Legomsky puts it, "[T]here is no need to throw out the baby with the bathwater." *Id.* at 263.

²⁵ See *Fong Yue Ting v. United States*, 149 U.S. 698, 705-06 (1893).

²⁶ See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

²⁷ See *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-88 (1952).

²⁸ See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212-14 (1953).

Even United States citizens lack full constitutional protection at the country's borders. See *United States v. Ramsey*, 431 U.S. 606, 618-19 (1977). The Fourth Amendment protection against unreasonable searches and seizures will not apply to persons crossing the border. See *id.* at 621.

²⁹ Motomura, *supra* note 18, at 1704.

³⁰ See generally, *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

³¹ "Entry" is defined very generally in the INA as "any coming of an alien into the United States" INA § 1101(a)(13) (1994), 8 C.F.R. § 101(a)(13)(1995). However, many entries are not deemed "entries" in immigration law. For instance, an alien paroled by the INS into the country has not "entered." See *Leng May Ma*, 357 U.S. at 190. Also, a resident alien who makes an "innocent, casual, and brief" trip abroad does not "enter" when she crosses the border to return to the United States. See *Rosenberg v. Fleuti*, 374

have entered are deportable.³² The distinction between these proceedings is significant, because in deportation proceedings the government carries the burden of proof and the alien has greater procedural rights.³³

The Supreme Court has long maintained that immigrants seeking initial entry at our borders have no procedural due process rights.³⁴ However, even in an exclusion hearing, returning resident aliens do have such a right.³⁵ Furthermore, in a deportation hearing, the right to procedural due process is well established.³⁶ However, this right to procedural due process was an empty promise for many years. The following cases illustrate that whether in

U.S. 449, 462 (1963).

The Antiterrorism and Effective Death Penalty Act, *see supra* note 5, changes the definition of what it means to "enter" the United States. Section 414 of the Act states, in pertinent part:

Notwithstanding any other provision of this title, an alien found in the United States who has not been admitted to the United States after inspection in accordance with section 235 is deemed for the purposes of this Act to be seeking entry and admission to the United States and shall be subject to examination and exclusion by the Attorney General.

AEDPA §414 (1996). This section is to take effect on November 1, 1996. However, after the passage of the AEDPA, the Senate voted to delete section 414. *See* S. Con. Res. 55, 104 Cong., (1996). The future of this provision is uncertain at this time.

³² *See generally*, 2 CHARLES GORDON, ET AL., IMMIGRATION LAW AND PROCEDURE § 65.02[2] (Rev. ed. 1996); AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 1-23 (3d ed. 1994).

³³ *See* FRAGOMEN & BELL, *supra* note 32, at 1-23.

³⁴ *See, e.g.*, *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Brownell v. We Shung*, 352 U.S. 180 (1956); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Lee Lung v. Patterson*, 186 U.S. 168 (1902); *Li Sing v. United States*, 180 U.S. 486 (1901); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). However, it could be argued that some excludable aliens have a protected interest before they enter this country. For instance, political refugees who seek asylum and are protected by international agreements may have a protected interest.

³⁵ *See Fleuti*, 374 U.S. at 462 (determining that an innocent, casual, and brief excursions outside of this country do not subject aliens to the harsh consequences of "entry" upon their return); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (finding resident alien returning from a voyage is a person within protection of Fifth Amendment, and that status cannot be taken from him without an opportunity to be heard).

³⁶ *See Galvan v. Press*, 347 U.S. 522, 530 (1954); *Carlson v. Landon*, 342 U.S. 524, 534 (1952); *Bridges v. Wixon*, 326 U.S. 135, 138-39 (1945); *Ng Fung Ho v. White*, 259 U.S. 276, 279 (1922); *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903).

exclusion or deportation proceedings, aliens were at the mercy of legislative plenary power over immigration.

The immigration cases before the 1980s demonstrate the harsh results of the plenary power doctrine. For instance, in *Galvan v. Press*,³⁷ the Supreme Court stated that

[i]n light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress . . . much could be said for the view, *were we writing on a clean slate*, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress *But the slate is not clean.*³⁸

In *Galvan*, the Court deferred to Congress's plenary power over immigration and allowed the deportation of a man who lived in the United States for over thirty years, but had recently associated with the Communist party.³⁹ The Court emphasized *stare decisis* reasons for the endurance of the plenary power cases.⁴⁰ Yet as one commentator has noted, "It is noteworthy, if not striking, that the doctrine, a product of the same era as *Plessy v. Ferguson*, has faded so little with the passage of time."⁴¹

With a similar zealous deference, the Court in *Shaughnessy v. United States ex rel. Mezei*,⁴² proclaimed, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁴³ In *Mezei*, the alien had lived in the United States for twenty-five years but made a trip abroad and was excluded on the basis of confidential information without a hearing.⁴⁴

³⁷ 347 U.S. 522 (1954).

³⁸ *Id.* at 530-31 (emphasis added).

³⁹ *See id.* at 530.

⁴⁰ *See id.* at 531.

⁴¹ Motomura, *supra* note 17, at 554-55; *Plessy v. Ferguson*, 163 U.S. 537 (1896), legitimized official racial segregation as "separate but equal." *See id. Brown v. Board of Education*, 347 U.S. 483 (1954), repudiated this holding. The Court recognized that "[s]eparate educational facilities are inherently unequal." *Id.* at 495.

For a discussion of *Plessy* and the factor that race has played in the framing, ratification, and development of our Constitution, see DONALD E. LIVELY, *THE CONSTITUTION AND RACE* 90-99 (1992). For a discussion of the racist roots of immigration law, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 860 (1987) (noting that the first immigration laws explicitly excluded certain races).

⁴² 345 U.S. 206 (1953).

⁴³ *Id.* at 212.

⁴⁴ *See id.* at 208. Like many of the cases of this era, the decision occasioned an

In *Mathews v. Diaz*⁴⁵ the Court again allowed Congress to make a rule that would have been unacceptable if applied to citizens.⁴⁶ A Social Security Act provision that denied benefits to aliens not meeting a five-year residency requirement was upheld.⁴⁷ The Court stated that no alien "can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests."⁴⁸ These cases demonstrate the disturbing results which occurred when the Court unduly deferred to congressional power over immigration, and they set the stage for the changes in the 1980s.

B. *Plasencia and the Modern Promise of Real Due Process*

Nearly a century after its incarnation, the plenary power doctrine has loosened its stronghold on immigration jurisprudence, at least for resident aliens. Immigration law has moved from "never-never land" into the mainstream of constitutional law. The procedural due process that was for so long "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned,"⁴⁹ has become meaningful due process. The paradigm-shifting case was the Supreme Court's 1982 decision in *Landon v. Plasencia*.⁵⁰

Plasencia held that even aliens in exclusion proceedings could claim procedural due process rights.⁵¹ Ms. Plasencia was returning from a trip abroad and was deemed excludable because her departure from this country was meaningful.⁵² Justice O'Connor, writing for the Court, explained that

impassioned dissent. Justice Jackson stated, "The Government all but adopts the words of one of the officials responsible for the administration of this Act who testified before a congressional committee as to an alien applicant, that 'He has no rights.'" *Id.* at 221 (Jackson, J., dissenting). He went on to compare INS detention policy to "the 'protective custody' of the Nazis more than of any detaining procedure known to the common law." *Id.* at 226.

⁴⁵ 426 U.S. 67 (1976).

⁴⁶ *See id.* at 80.

⁴⁷ *See id.* at 87.

⁴⁸ *Id.* at 80 (emphasis in original).

⁴⁹ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *Knauf v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

⁵⁰ 459 U.S. 21 (1982).

⁵¹ *See id.* at 32-34. For more background on the case, see Elaine R. Parry, Comment, *Ensuring Due Process in Alien Exclusion Proceedings After Landon v. Plasencia*, 34 *HASTINGS L.J.* 911 (1983).

⁵² She was not making an "innocent, casual, and brief" trip abroad, as described in *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963). *See supra* note 31. Thus, her return was an

Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation and, although we have only rarely held that the procedures provided by the executive were inadequate, we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation.⁵³

The Court noted that "the constitutional sufficiency of procedures provided in any situation" will vary with the circumstances.⁵⁴ To determine just how much process is due the alien, the Court turned to the balancing test of *Mathews v. Eldridge*.⁵⁵

Mathews and *Goldberg v. Kelly*⁵⁶ are the principle cases in what has been called the due process revolution of the 1970s. *Goldberg* held that due process requires a pre-termination evidentiary hearing for recipients of Aid to Families with Dependent Children (AFDC) and recipients of financial aid from New York's Home Relief program.⁵⁷ *Mathews* held that a full evidentiary pre-termination hearing is not required for recipients of social security disability benefits.⁵⁸ Both cases used a balancing approach to due process in the administrative law context. *Plasencia* brought the balancing approach from other areas of administrative law into the realm of immigration law.

Mathews describes three factors for the courts to examine:

First, the private interest that will be affected . . . ; second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵⁹

Justice O'Connor discussed the application of the *Mathews* test to *Plasencia*, but declined to draw any conclusions.⁶⁰ O'Connor explained,

Plasencia's interest here is, without question, a weighty one. She stands to lose the right "to stay and live and work in this land of freedom." Further, she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual. The Government's interest in efficient

"entry" under the entry doctrine, and she was subject to exclusion proceedings.

⁵³ *Plasencia*, 459 U.S. at 32-33 (internal citations omitted).

⁵⁴ *Id.* at 34.

⁵⁵ 424 U.S. 319 (1976).

⁵⁶ 397 U.S. 254 (1970).

⁵⁷ *See id.* at 270.

⁵⁸ *See Mathews*, 424 U.S. at 329.

⁵⁹ *Id.* at 335.

⁶⁰ *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature.⁶¹

The case was remanded to the lower court to determine whether *Plasencia* had indeed received sufficient due process.⁶² *Plasencia* had challenged three specific aspects of her exclusion proceedings: the allocation of the burden of proof, the adequacy of notice, and the failure to inform her of the right to representation.⁶³ *Plasencia* was litigated before the promulgation of regulations requiring the immigration judge to inform aliens of the right to counsel. O'Connor stated that precisely what procedure was due had not been "adequately developed by the briefs or argument," and she declined to decide the issue.⁶⁴

Plasencia left open the question of just what process is due, but it did place the question in the context of a balancing test. No longer could congressional plenary power automatically trump an alien's interest in procedural due process.

In 1993, the Court was presented with an opportunity to clarify the parameters of the procedural due process right. In *Reno v. Flores*,⁶⁵ a class of detained juvenile aliens sought prehearing release to responsible adults, or at least an individual determination as to whether such release was appropriate.⁶⁶ They also claimed that as juveniles with little command of the English language, they could not knowingly waive their rights.⁶⁷ Justice Scalia, writing for the Court, construed away the procedural due process claim as "just the 'substantive due process' argument recast in 'procedural due process' terms," and rejected it with virtually no discussion.⁶⁸ He went on to characterize the substantive right involved as a right to be released to private custodians and denied the claim.⁶⁹

⁶¹ *Id.* (citations omitted).

⁶² *See id.* at 37. Justice Marshall indicated that he would have decided the case and would have determined that procedural due process was violated. *See id.* at 41 (Marshall, J., dissenting).

⁶³ *See id.* at 35-36.

⁶⁴ *Id.* at 37 n.9.

⁶⁵ 507 U.S. 292 (1993).

⁶⁶ *See id.* For more detail on the *Flores* case, see Gail Quick Goeke, *Substantive and Procedural Due Process for Unaccompanied Alien Juveniles*, 60 MO. L. REV. 221 (1995).

⁶⁷ *See Flores*, 507 U.S. at 306.

⁶⁸ *Id.* at 308.

⁶⁹ *See id.* at 302.

Flores presented the Court with an opportunity to clarify *Plasencia*, but the Court declined. *Flores* may be limited to the particular facts of the case. Justice Scalia placed much emphasis on the fact that children were involved, and "juveniles, unlike adults, are always in some form of custody."⁷⁰ The challenge to the INS policy of transferring immigrants to remote detention centers presented the Court with another opportunity to explain just what process is due to resident aliens.⁷¹

C. *The Importance of Access to Counsel*

A salient aspect of procedural due process is the right to assistance of counsel.⁷² In a now famous article, the late Second Circuit Court of Appeals Judge Henry J. Friendly enumerated the traditional elements of a fair hearing, and he included the right to counsel among the most important procedural rights.⁷³

As important as the right to counsel is, the alien does not have the same right to counsel as the criminal.⁷⁴ Deportation proceedings are not criminal in nature, so criminal due process safeguards do not apply. In *Fong Yue Ting v. United States*,⁷⁵ the Supreme Court refused to apply the Fourth, Sixth, and Eighth Amendments to deportation hearings. The Court stated that deportation

⁷⁰ *Id.* (quoting *Schall v. Martin*, 467 U.S. 253 (1984)). The case may be viewed as a blow for children's rights rather than as a blow for immigrants' rights.

⁷¹ More cases challenging this INS transfer policy are likely to follow. But, yet another opportunity to address the parameters of *Plasencia*, and apply the *Eldridge* test may present itself in the near future. Congress's recent antiterrorism initiative is likely to be challenged as violative of procedural due process. See The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)(AEDPA). See *supra* notes 5 and 31. The Act provides for deportation of "terrorists" without allowing the accused to see the evidence to be used against him. See AEDPA § 401(a)(1996). For a description of the evolution of the alien's right to due process, as well as a detailed application of the *Plasencia* test to the new law, see Jim Rosenfeld, Note, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 742-48 (1995).

⁷² "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); see also *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

⁷³ See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1287 (1975) (ranking the right to counsel as number seven on his list of the top eleven rights).

⁷⁴ The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

⁷⁵ 149 U.S. 698 (1893).

is not a punishment for a crime, but merely a removal from this country.⁷⁶ To this day, the Sixth Amendment right to appointed counsel is not available in immigration proceedings.⁷⁷ For the immigrant facing deportation because he has committed crimes while residing here,⁷⁸ deportation seems quite like a punishment for crime. Nonetheless, the right to counsel for immigrants is rooted in the Fifth Amendment right to due process, rather than the Sixth Amendment. As the Supreme Court has explained,

Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness.⁷⁹

This Case Comment will not argue for a right to counsel at the government's expense.⁸⁰ The cases hinting at such a right will be explored only to emphasize the importance of counsel in deportation hearings. For example, in *Aguilera-Enriquez v. INS*,⁸¹ the Sixth Circuit Court of Appeals stated that "[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated."⁸²

Likewise, in *Escobar Ruiz v. INS*,⁸³ the Ninth Circuit explained that "[t]he [F]ifth [A]mendment guarantee of due process applies to immigration

⁷⁶ See *id.* at 709.

⁷⁷ See, e.g., *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987).

⁷⁸ The INA provides, "Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude . . . is deportable." INA § 1251(a)(2)(A)(ii) (1994).

⁷⁹ *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

⁸⁰ The argument has been made by many commentators, including: Irving A. Appleman, *Right to Counsel in Deportation Proceedings*, 14 SAN DIEGO L. REV. 130 (1976); Robert N. Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 U.C. DAVIS L. REV. 289 (1975); Elizabeth Glazer, Note, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157 (1985); William Haney, Comment, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 177 (1970); David A. Robertson, Comment, *An Opportunity to Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019 (1988).

⁸¹ 516 F.2d 565 (6th Cir. 1975).

⁸² *Id.* at 569 n.3.

⁸³ 787 F.2d 1294 (9th Cir. 1986), *withdrawn*, *Escobar Ruiz v. I.N.S.*, 818 F.2d 712 (9th Cir. 1987).

proceedings, and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel despite the prohibition of section 292."⁸⁴ Even if due process does not require appointed counsel, it at the very least should require that the government not impede access to counsel. When a right as important as the right to assistance of counsel is at stake, the government should not be allowed to take affirmative actions to deprive aliens of this right.

The right to counsel is seriously affected when the alien is transferred far from his home. In *La Franca v. INS*,⁸⁵ the Second Circuit explained, "There is no clear mandate in either the statute or regulations as to where a hearing should be held,"⁸⁶ but noted in a footnote that "[o]rdinarily the better procedure would be to hold the hearing in the district of the alien's residence or place of arrest. *Obviously it should not be held in a district so far removed from his residence or place of arrest as to deprive him of a fair hearing.*"⁸⁷ These cases suggest that when the INS transfers aliens far from their residences to a remote detention center in a small, Louisiana town, the INS deprives those aliens of access to counsel, evidence, witnesses, and thus procedural due process.

D. Sidestepping the Constitutional Question with the Statutes

The right to access to counsel is found in the Fifth Amendment right to due process,⁸⁸ but it is also explicit in the Immigration and Nationality Act. The Act provides that aliens facing deportation "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."⁸⁹

The statutory right to counsel reflects the constitutional mandate of due process. In *Rios-Berrios v. INS*,⁹⁰ the Ninth Circuit explained that "due process mandates that [the immigrant] is entitled to counsel of his own choice at his

⁸⁴ *Id.* at 1297 n.3. The "prohibition" in section 292 that the court refers to is implied from the following language: "[The alien] shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." INA § 1362 (1994), 8 C.F.R. § 292 (1995).

⁸⁵ 413 F.2d 686 (2d Cir. 1969).

⁸⁶ *Id.* at 689.

⁸⁷ *Id.* at 689 n.9 (emphasis added).

⁸⁸ U.S. CONST. amend. V; *see supra* note 20.

⁸⁹ 8 C.F.R. § 292 (1995), INA § 1362 (1994).

⁹⁰ 776 F.2d 859 (9th Cir. 1985).

own expense under terms of the [INA]”⁹¹

However, the Act also provides that the INS has the authority to transfer aliens.⁹² Thus, the transfer issue could be approached as a matter of statutory interpretation. The issue becomes how the courts are to harmonize these two statutes, and how expansive the INS authority to transfer is under the Act.

The Supreme Court has explained that when interpreting immigration statutes, “[e]ven if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.”⁹³ The Supreme Court has also explained that “since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings”⁹⁴ Furthermore, a statute that is intended to “ameliorate hardship and injustice” should not be construed restrictively or technically to frustrate its ameliorative purpose.⁹⁵

The statutory right to counsel must be read expansively if it is to have real meaning. It cannot mean merely that one has a right to counsel when one is likely to prevail on the merits. Effective deprivation of counsel does not require a showing of prejudice.⁹⁶ In *Montilla*, the immigration judge asked the alien whether or not he wished to have counsel, and the alien stated that he didn’t

⁹¹ *Id.* at 862.

⁹² See INA § 1252(c). “The Attorney General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section.” *Id.*

⁹³ *INS v. Errico*, 385 U.S. 214, 225 (1966).

⁹⁴ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

⁹⁵ See *Git Foo Wong v. INS*, 358 F.2d 151, 152–53 (9th Cir. 1966) (citing *Wadman v. INS*, 329 F.2d 812, 817 (9th Cir. 1964)).

⁹⁶ See *Montilla v. INS*, 926 F.2d 162, 168 (2d Cir. 1991) (reversing denial of 212(c) relief because alien was denied right to counsel); *Castaneda-Delgado v. INS*, 525 F.2d 1295 (7th Cir. 1975) (rejecting harmless error rule); *Chlomos v. INS*, 516 F.2d 310, 314 (3d Cir. 1975) (stating that it would not require showing of prejudice if confronted with the issue); *Yiu Fong Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969) (finding a lack of counsel inherently prejudicial to case); *Molaire v. Smith*, 743 F. Supp. 839, 848–49 (S.D. Fla. 1990) (rejecting harmless error rule where alien never knew he had right to counsel); see also 1 GORDON, *supra* note 32, § 4.01[1].

However, the BIA has taken the position that there is no due process violation without a showing of prejudice. See *In re Santos*, 19 I. & N. Dec. 105, 107 (BIA 1985). The administrative agency applies a “harmless error” rule, regardless of the law of the circuit. See *id.* at 108. But see *Rios-Berrios v. INS*, 776 F.2d 859, 863 n.1 (9th Cir. 1985) (criticizing the *Santos* rule of BIA).

know what to do.⁹⁷ The judge granted a continuance, but when the immigrant appeared unrepresented the second time, the judge went ahead with the proceeding.⁹⁸ The reviewing court held that the agency must scrupulously adhere to the right to counsel regulations, and held that the alien need not show prejudice from the lack of counsel.⁹⁹ The court recognized that for the right to mean something, it must be read expansively.

The statutory right to counsel reflects the mandates of due process and has an ameliorative purpose. It should not be interpreted restrictively to frustrate this purpose. On the other hand, the INS authority to transfer aliens is born merely of administrative convenience. Congress could not have intended for the INS to have the authority to deprive aliens of their right to counsel by transferring them to remote locations.

In addition, the legislative history of the 1952 Immigration and Nationality Act indicates congressional intent to confer a right to immigrants, and not a mere privilege. The legislative history reads, in pertinent part:

Regulations promulgated by the Attorney General for the conduct of hearings *must* provide for adequate notice to the alien of the nature of the charges against him and the time and place of the hearing; that the alien *shall have the right* of being represented (at no expense to the Government) by counsel; that the alien *shall* be permitted to examine evidence against him and to present evidence¹⁰⁰

The right of being represented must mean at least that the INS cannot frustrate access to counsel by arbitrary transfers. To interpret the statute to allow the INS to transfer aliens to whatever place it deems convenient would work an absurd result.¹⁰¹ Congress would have granted a right that may be arbitrarily taken away if the Government finds it convenient. It will always be most convenient for the INS to ignore procedural due process and detain the alien as far away from his home as possible.

⁹⁷ *Montilla*, 926 F.2d at 164.

⁹⁸ *See id.*

⁹⁹ *See id.* at 168.

¹⁰⁰ H.R. REP. NO. 82-1365, at 57, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1712 (emphasis added).

¹⁰¹ The canon of statutory interpretation that requires the courts to avoid absurd results was explained in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). There, the Court interpreted a statute barring the importation of foreign laborers to be limited only to manual laborers. The Court reasoned that to interpret the statute to also bar religious workers would work an absurd result. *See id.* at 472.

III. THE INSTANT CASE

A. *The Facts of Nelson Gandarillas-Zambrana's Case*

Nelson Gandarillas-Zambrana left Bolivia in 1981, when he was only fifteen years old.¹⁰² He entered the United States as a legal permanent resident, and since then, he has lived and worked in the United States.¹⁰³ His entire family has relocated to the United States, including his elderly mother who depends on his financial support.¹⁰⁴ He was convicted of two petit larceny crimes in Virginia, and thus was served with an Order to Show Cause why he should not be deported in March of 1993.¹⁰⁵

An alien who is convicted of two or more crimes involving moral turpitude, regardless of whether he has been confined for the crimes, is deportable.¹⁰⁶ To escape this harsh consequence, an alien may apply for discretionary relief from deportation.¹⁰⁷ The immigration judge must consider both the positive and negative equities in each individual case to decide whether to exercise her discretion and grant the relief.¹⁰⁸ A familiarity with the cases

¹⁰² See *Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1253 (4th Cir.), *cert. denied*, 116 S. Ct. 49 (1995).

¹⁰³ See *id.* at 1254.

¹⁰⁴ See *id.* The court stated that Gandarillas contributed \$8000 to his mother's down payment on her home, and he contributed to her mortgage payments. In addition, his mother is unable to work due to a back injury. Yet, in the face of evidence that his mother was, in fact, financially dependent on him, the court concluded that she was not. Apparently, the court decided that his mother could turn to his siblings for support. See *id.*

¹⁰⁵ See *id.* at 1253-54.

¹⁰⁶ See INA § 1251(a)(2)(A)(ii) (1994).

¹⁰⁷ The 212(c) waiver of deportation is in the section of the INA relating to exclusion grounds, not deportation grounds. It provides:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to [the grounds for exclusion]

INA § 1182(c), 8 C.F.R. § 212(c). Although on its face, the relief applies only to exclusion proceedings, it has consistently been found applicable to deportation hearings as well. See, e.g., *Nunez-Pena v. INS* 956 F.2d 223 (10th Cir. 1992); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976). Thus, the alien need not "proceed abroad" to be eligible for the relief.

¹⁰⁸ The immigration judge is supposed to consider the following equitable factors: (1) family ties within the United States, (2) residence of long duration, (3) evidence of hardship

dealing with 212(c) relief, or a representative with such knowledge, would be very helpful to the alien presenting himself before the judge. Gandarillas-Zambrana had neither at his deportation proceeding.

The venue of his proceeding was originally set near his home in Virginia, but the INS transferred Gandarillas-Zambrana to the Federal Detention Center in Oakdale, Louisiana. The deportation proceeding was held in Louisiana in December of 1993.¹⁰⁹ He was not able to find counsel to represent him, he did not have a Spanish translator, and he appeared in prison clothes.¹¹⁰ Gandarillas-Zambrana told the judge that he wanted a lawyer, but he could not find one in Oakdale.¹¹¹ Both the government's attorney and the immigration judge questioned him. His application for 212(c) relief was denied by the immigration judge.¹¹²

An appeal was taken to the Board of Immigration Appeals. On January 6, 1994, the BIA issued a two sentence decision,¹¹³ and ordered him deported. Appeal was taken to the Fourth Circuit Court of Appeals, but on January 20, 1995, the court affirmed his deportation.¹¹⁴ Gandarillas-Zambrana petitioned for certiorari, but review was denied.¹¹⁵

B. *The Reasoning: Whatever Process INS Gave You Is Good Enough*

The Fourth Circuit Court of Appeals affirmed Gandarillas-Zambrana's

to respondent and his family, (4) service in the military, (5) history of employment, (6) existence of property or business ties, (7) evidence of value and service to the community, (8) proof of rehabilitation from criminal activity, and (9) other good character evidence. The judge also considers the following negative factors: (1) nature and circumstances of deportation ground, (2) any additional significant violations of immigration laws, (3) nature, frequency, and seriousness of criminal record, and (4) other bad character evidence. *See Varela-Blanco v. INS*, 18 F.3d 584, 586 (8th Cir. 1994) (quoting *In re Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978)). These *Marin* factors are the standard accepted by federal courts and the BIA.

The immigration judge's exercise of discretion is subject only to "arbitrary, capricious, or abuse of discretion" review. *Wojcik v. INS*, 951 F.2d 172, 173 (8th Cir. 1991). Thus, the immigration judge's initial determination at the deportation proceeding level is of vital significance. An adverse ruling has little chance of being overturned, thus presence of counsel may significantly change the ultimate outcome for the alien.

¹⁰⁹ *See Gandarillas-Zambrana*, 44 F.3d at 1254.

¹¹⁰ *See id.* at 1255.

¹¹¹ *See id.* at 1254.

¹¹² *See id.* at 1254-55.

¹¹³ *See* Petitioner's Reply Brief at 10, *Gandarillas-Zambrana* (No. 94-1248).

¹¹⁴ *See Gandarillas-Zambrana*, 44 F.3d at 1251.

¹¹⁵ *See Gandarillas-Zambrana v. Board of Immigration Appeals*, 116 S. Ct. 49 (1995).

order of deportation.¹¹⁶ The court stated that “[i]n all the respects challenged, the proceedings were conducted in accordance with governing statutes and regulations”¹¹⁷ This explanation echoes the infamous words, “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”¹¹⁸

The court stated that the INS has the right to transfer aliens from one detention center to another.¹¹⁹ Thus, there was nothing “inherently irregular, not to say unconstitutional, about the transfer from Virginia to Louisiana.”¹²⁰ The court said that the INA guaranteed the “same rights and privileges at a deportation proceeding in Louisiana as it would elsewhere.”¹²¹ According to this reasoning, the INS could transfer an alien literally anywhere, from ten miles away to a thousand miles away, and would not be affecting his rights.

The court acknowledged that Gandarillas-Zambrana had the right to counsel, but quoted from a case that construed that right as a mere “privilege.”¹²² The statute uses mandatory language,¹²³ and Gandarillas-Zambrana argued that Congress intended to confer a right to immigrants, not a mere privilege.¹²⁴

Nonetheless, the court minimized the right at stake, citing *Committee of Central American Refugees v. INS*¹²⁵ and *Sasso v. Milhollan*¹²⁶ for the proposition that the alien does not have the right to be detained “where his

¹¹⁶ See *Gandarillas-Zambrana*, 44 F.3d at 1259.

¹¹⁷ *Id.* at 1255.

¹¹⁸ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (citing *Knauf v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

¹¹⁹ See *Gandarillas-Zambrana*, 44 F.3d at 1256.

¹²⁰ *Id.*

¹²¹ *Id.* at 1256. See discussion *infra* notes 160–64 on how change of location can affect rights of aliens, due to differences in circuit law, as well as differences in ease of retaining counsel.

¹²² The court cited *Delgado-Corea v. INS*, 804 F.2d 261 (4th Cir. 1986), for the statement that he had a “privilege of legal representation” *Id.* at 262 (emphasis added). This statement evokes the right/privilege distinction that is at the heart of the much-criticized guest/host rationale for the plenary power doctrine. See *supra* note 24 and accompanying text.

¹²³ The Act provides, “[T]he alien *shall* be given notice . . . , the alien *shall* have the privilege of being represented . . . , the alien *shall* have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf” 8 C.F.R. § 242(b)(1)–(3) (1995), INA § 1252 (1994) (emphasis added).

¹²⁴ See H.R. REP. NO. 82-1365, at 57, reprinted in 1952 U.S.C.C.A.N. 1653, 1712.

¹²⁵ 795 F.2d 1434, 1439 (9th Cir. 1986).

¹²⁶ 735 F. Supp. 1045, 1049 (S.D. Fla. 1990).

ability to obtain representation is the greatest.”¹²⁷ The court stated that Gandarillas-Zambrana did not retain counsel in Virginia before his transfer, and that his “bald allegations” that counsel was unavailable did not establish a violation of his due process or statutory right to counsel.¹²⁸

The court went on to state that a “lack of specificity” was fatal to Gandarillas-Zambrana’s claim.¹²⁹ The court would not find a violation of due process because it was not sure how the venue affected his hearing. The court stated that he “ha[d] not demonstrated any practical prejudice” resulting from the inability to use live witnesses.¹³⁰ Thus, the court refused to recognize that the more than one thousand mile transfer to a remote location where Gandarillas-Zambrana could not obtain counsel was per se prejudicial to his case.

IV. ANALYSIS

A. *The Court Should Have Followed Plasencia*

The Fourth Circuit ignored the *Plasencia* holding.¹³¹ When the court stated that “in all the respects challenged, the proceedings were conducted in accordance with governing statutes and regulations,”¹³² it essentially deferred to the political judgments of Congress and the INS. This deference was expressed in the *Mezei* decision: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”¹³³

¹²⁷ *Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir.), *cert. denied*, 116 S. Ct. 49 (1995). Contrary to the court’s characterization, the essence of Gandarillas-Zambrana’s claim was not that he should have a right to be detained where it was *most* convenient for him, he merely wanted a fair hearing in a location that was not the *least* convenient.

¹²⁸ *See id.* Gandarillas-Zambrana did not have time to obtain counsel before his transfer to Oakdale, Louisiana. Contrary to the court’s statement, this fact does not work against him. Indeed, his transfer to Oakdale before he could obtain counsel in Virginia effectively impinged his right to counsel. The court ignored the reality of the situation: because he was transferred to this remote location, he was unable to retain counsel.

¹²⁹ *Id.*

¹³⁰ *Id.* The court noted that he could only present evidence in the form of letters and documents, but did not acknowledge that live witnesses may have been more persuasive to the judge. *See id.*

¹³¹ *See supra* Part II.B.

¹³² *Gandarillas-Zambrana*, 44 F.3d at 1255.

¹³³ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (citing *Knauf v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

But unlike that 1952 exclusion case, here the court faced a long time green card holder and a significant change in immigration jurisprudence.¹³⁴

After *Plasencia*, procedural due process claims are to be evaluated according to the balancing test used in other areas of administrative law. *Plasencia* requires the court to examine "the interest at stake for the individual, the risk of an erroneous deprivation of the interest . . . as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures."¹³⁵

In *Plasencia*, the Court recognized that the immigrant's private interest is "without question, a weighty one."¹³⁶ The interest in remaining with family members, and the great liberty interest in not being banished to his country of origin, must weigh heavily in the balance. Gandarillas-Zambrana was a legal permanent resident for nearly fifteen years, and his ties to this country are strong.

Second, the risk of an erroneous deprivation of the alien's liberty interest is high if she proceeds without a representative at a remote location. The value of additional or substitute procedures, such as holding the hearing near the alien's home, is evident. The availability of witnesses in Virginia for Gandarillas-Zambrana illustrates this point. If he had been represented at the deportation hearing, he would most likely have been advised to move for a change of venue.¹³⁷ In Virginia, he could have presented compelling evidence of the equities necessary for 212(c) relief. He could have called family members, his mother who depended on his support, his employer, the members of the

¹³⁴ In addition, the INS transfer policy is not mandated by Congress; it is an action by the administrative agency. Deference to the administrative agency when it is interpreting the scope of its own authority is not called for by the *Chevron* doctrine. See *infra* notes 150-57 and accompanying text.

¹³⁵ *Plasencia*, 459 U.S. at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¹³⁶ *Id.*

¹³⁷ The alien must move for a change of venue; the court will not grant it spontaneously. See 8 C.F.R. § 3.20 (1996). The party moving for the change of venue must show "good cause." See *In re Rahman*, 20 I. & N. Dec. 480, 482-83 (BIA 1992) (setting forth the factors the immigration judge will consider in changing venue). Changes of venue should not be dispensed or withheld arbitrarily. See *Campos v. Nail*, 43 F.3d 1285, 1289 (9th Cir. 1994) (granting injunctive relief for a class of aliens from El Salvador and Guatemala who had been routinely denied changes of venue by an immigration judge).

When the alien is able to obtain counsel and moves for a change of venue, the INS still tries to prevent his access to counsel. The INS is currently routinely opposing motions for changes of venue. Telephone interview with Manuel Vargas, Supervising Attorney of Immigration Law Unit of Legal Aid Society (Feb. 26, 1996).

nonprofit dance troupe he belonged to, law students from the Georgetown Street Law Project in which he participated as a volunteer, and perhaps others.¹³⁸ A judge with this evidence of positive equities and rehabilitation before her would be more likely to grant relief than a judge one thousand miles away who has seen none of this evidence. The risk of an erroneous deprivation is further heightened by the difficulties of language faced by Gandarillas-Zambrana and many other immigrants.

Third, the governmental interests—the fiscal and administrative burdens that the additional or substitute requirement would entail—should have been examined. The plenary power doctrine is a mere factor in this analysis; it is not dispositive. In *Louis v. Meissner*,¹³⁹ a federal court stated:

The only harm that could result to defendants as a result of the issuance of a temporary restraining order [preventing similar transfers to a Florida facility] consists of administrative inconvenience Such administrative inconvenience is, of course, of no consequence in comparison to the potential losses which the plaintiffs may suffer¹⁴⁰

The court went on to explain that the transfer policy of the INS

subjected [the aliens] to a human shell game in which the *arbitrary Immigration and Naturalization Service* has sought to scatter them to locations that, with the exception of Brooklyn are all in desolate, remote . . . areas, containing a *paucity of available legal support* and few, if any, Creole interpreters. In this regard, INS officials have acted as haphazard as the rolling seas¹⁴¹

Furthermore, the nation's sovereignty is not implicated here. Gandarillas-Zambrana's case has very little to do with the national security or sovereignty rationales that traditionally support the plenary power doctrine. Therefore, the government's plenary power over immigration should not weigh heavily in the balance here.¹⁴² Neither mere administrative inconvenience, nor the sovereign

¹³⁸ See *Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1254 (4th Cir.), *cert. denied*, 116 S. Ct. 49 (1995).

¹³⁹ 530 F. Supp. 924 (S.D. Fla. 1981).

¹⁴⁰ *Id.* at 928–29.

¹⁴¹ *Id.* at 926 (emphasis added).

¹⁴² When Justice O'Connor articulated the interests involved in the *Plasencia* case, she labeled each interest "weighty." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). The alien's interest in remaining in the U.S. is "weighty," the right to family unity is "weighty," and the government's interest in border control is also "weighty." See *id.* But, *Plasencia* does not stand for the proposition that the government's plenary power over immigration is the

prerogative over immigration matters, outweigh the substantial interests of a long time resident alien in Gandarillas-Zambrana's situation.

By ignoring the balancing test articulated by the Supreme Court, the Fourth Circuit has shortchanged immigrants' rights. Procedural due process requires more in a situation such as Gandarillas-Zambrana's than an empty right to counsel where none, or nearly none, are available.

B. The Court Should Have Read the Statute to Mean Something

The court viewed the statutory right to counsel as a right to a hypothetical counsel who may or may not exist. The court had no problem with the INS transferring the immigrant thousands of miles from his home, family, friends, and employer, to a place with a paucity of legal representation. If this is all the "right to counsel" means, then why is it there at all?

The court could have focused on the statutory right to counsel, avoiding the constitutional problem. The Immigration and Nationality Act gives the INS the authority to transfer aliens,¹⁴³ and it gives the aliens a right to counsel.¹⁴⁴ At some point, these two provisions conflict. The court should have recognized that the INS authority to transfer is not limitless.¹⁴⁵ When the alien is transferred to a remote location where there is a paucity of free or low cost legal counsel, that transfer effectively impinges on the right to counsel.

The immigrant's statutory right to counsel has been interpreted by the federal courts to encompass notice of the right,¹⁴⁶ a reasonable opportunity to obtain representation,¹⁴⁷ and protection from waivers of the right that are made

most weighty factor.

¹⁴³ See INA § 1252(c) (1994).

¹⁴⁴ See INA § 1362, 8 C.F.R. § 292 (1995).

¹⁴⁵ *Gandarillas-Zambrana* points out that the INS position leads to absurd results because "following this line of thinking it is quite acceptable to transfer such Petitioner to Nome, Alaska; Hawaii; Guam; Puerto Rico; Outer Mongolia; or the moon for that matter." Petitioner's Reply Brief at 4, *Gandarillas-Zambrana* (No. 94-1248). The Fourth Circuit relied on *Sasso v. Milhollan*, 735 F. Supp. 1045 (S.D. Fla. 1990) for the proposition that the INS has broad discretion to transfer aliens, but *Gandarillas-Zambrana* argued that this discretion must have some limit.

¹⁴⁶ See, e.g., *Villegas v. INS*, 745 F.2d 950, 951 (5th Cir. 1984) (determining that if immigrant was not informed of right to counsel, the case would be reopened on remand whether or not prejudice to the alien was shown).

¹⁴⁷ See, e.g., *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985) (finding that continuances granted to the alien to give him time to get counsel were not sufficient because they only gave him two business days); see also *Chlomos v. INS*, 516 F.2d 310, 314 (3d Cir. 1975) (determining that a refusal to grant immigrant's request for a change of venue impeded his access to counsel). But see *Lovell v. INS*, 52 F.3d 458, 462 (2d Cir. 1995)

without full understanding.¹⁴⁸ However, when the alien is transferred to a remote processing center like Oakdale, she is given a list of counsel who will probably not travel to her location. She may get a continuance in order to fruitlessly call the counsel on the list, but when all attempts to obtain counsel fail, the alien is deemed to have "waived" the right to counsel by appearing without one.

A more expansive reading of the statutory right to counsel is consistent with canons of interpretation traditionally applied to immigration law. Ambiguity should be resolved in favor of the alien,¹⁴⁹ because the liberty at stake is great, and the statute is intended to provide relief for immigrants.¹⁵⁰ Indeed, deportation may deprive the alien of "all that makes life worth living."¹⁵¹

A more expansive reading of the statutory right to counsel is also consistent with the *Chevron* doctrine.¹⁵² *Chevron* requires deference to administrative agency interpretations in limited instances, but not when the agency is determining the scope of its own authority.¹⁵³ Congress does not mandate the INS transfer policy; it is an action by the administrative agency. The INS interpretation of its authority to transfer aliens to whatever facility it so chooses is not reasonable. It cannot be a reasonable interpretation of the

(holding that a refusal to grant a change of venue impeded access to counsel, yet was harmless error).

¹⁴⁸ See *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1313 (9th Cir. 1988) (finding a "laconic answer" not an intelligent and voluntary waiver of right to counsel). However, other circuits do not require such a high standard. For instance, the Eighth Circuit held that a mass simultaneous waiver by fifty-two immigrants, who were not individually questioned by the judge, was indeed an effective waiver of the right to counsel. See *United States v. Polanco-Gomez*, 841 F.2d 235, 237 (8th Cir. 1988).

¹⁴⁹ See *INS v. Errico*, 385 U.S. 214, 225 (1966).

¹⁵⁰ See *id.*

¹⁵¹ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

¹⁵² *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* requires that where Congress has not addressed the meaning of a statute, the courts should defer to reasonable agency determinations of meaning. See *id.* at 843-44.

However, deference is not applicable where the statute is clear, where congressional intent is discernable, or where the agency is clearly wrong in its interpretation. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987) (reversing agency's application of incorrect standard of proof in asylum claims). In *Cardoza-Fonseca*, the court made a distinction between "well-founded fear of persecution" and "clear probability of persecution," and did not allow the INS to determine the meaning of the admittedly "ambiguous" statute. *Id.* at 448-49.

¹⁵³ See *id.* at 448.

statutory grant of authority,¹⁵⁴ because it conflicts with the explicit congressional intent to grant aliens a right to counsel.¹⁵⁵ Thus, the transfers to remote detention centers are per se violative of the right to counsel.

Nonetheless, the Fourth Circuit imposed a "prejudice" requirement on aliens asserting deprivation of the right to counsel.¹⁵⁶ The right to counsel would not be violated without a specific showing of prejudice. One might ask, why not have a prejudice requirement? If Gandarillas-Zambrana's lawyer could not find him relief at the judicial review stage, what harm was done at the deportation proceeding stage? The answer is threefold.

First, the review of the immigration judge's decision is for abuse of discretion only.¹⁵⁷ This review means that the initial determination of the case may seriously hurt the alien's chances on appeal. When the case is fact intensive, the determination of the facts by the immigration judge can effectively settle the matter.

Second, the judge can neither predict when prejudice will occur nor really tell afterward if a case could have been better presented. A prejudice requirement asks the judge to guess whether counsel could have changed the outcome.

Third, counsel does in fact usually help the alien.¹⁵⁸ Counsel will be familiar with the procedure to move for a change of venue, familiar with the case law on 212(c) waivers, and familiar with other forms of relief.

¹⁵⁴ See INA § 1252(c) (1994).

¹⁵⁵ See INA § 1362, 8 C.F.R. § 292 (1995).

¹⁵⁶ See *Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1257 (4th Cir.), cert. denied, 116 S. Ct. 49 (1995). Additionally, in opposition to the petition for certiorari, the Board of Immigration Appeals focused on the argument that without a showing of prejudice there could be no violation of due process. See Respondent's Brief in Opposition at 3, *Gandarillas-Zambrana* (No. 94-1720).

¹⁵⁷ See *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). An abuse of discretion only occurs where a decision is made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group." *Id.* (quoting *Li Cheung v. Esperdy*, 377 F.2d 819, 820 (2d Cir. 1967)). In addition, the immigration judge's decision to deny a change of venue is overturned only for abuse of discretion. See *Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988).

¹⁵⁸ For example, in *Monilla v. INS*, 926 F.2d 162 (2d Cir. 1991), on remand, and after securing representation from the Legal Aid Society in New York City, the alien was able to secure the 212(c) relief from an immigration judge. This case validates the Second Circuit's position that lack of counsel is indeed per se prejudicial to the alien. Telephone interview with Manuel Vargas, Immigration Law Unit of Legal Aid Society (Feb. 26, 1996).

Furthermore, as the following example illustrates, sometimes in immigration cases location is everything.

The importance of location is demonstrated by the case of *Michael v. INS*.¹⁵⁹ Michael was transferred from his residence in New York to Oakdale, Louisiana,¹⁶⁰ where his application for 212(c) relief was denied.¹⁶¹ The case law of the Second Circuit differed from the case law of the Fifth Circuit in that 212(c) relief would have been available to Michael in the Second Circuit even though he had a firearms conviction.¹⁶² On appeal, with the assistance of counsel, Michael was able to obtain a stay of deportation because he was deprived of the right to have Second Circuit law applied to his case.¹⁶³ This case demonstrates that the INS does indeed affect the immigrant's rights by transferring him to another jurisdiction.¹⁶⁴ And it shows how the assistance of counsel can have a tremendous impact on the outcome for the alien.

C. The Court Should Have Taken This Opportunity to Clarify the Procedural Due Process Rights of Aliens

Many commentators have noted that immigration law is at a crossroads. No longer does the incantation of the plenary power doctrine excuse the courts from reviewing the constitutional claims of aliens.¹⁶⁵ But it is yet unclear just what process is due in the modern era. Gandarillas-Zambrana's attorney stated

¹⁵⁹ 48 F.3d 657 (2d Cir. 1995).

¹⁶⁰ This transfer moved his case from the Second Circuit to the Fifth Circuit.

¹⁶¹ See *Michael*, 48 F.3d at 662.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ Another example of the different treatment aliens may receive in different circuits is illustrated in *Rosendo-Ramirez v. INS*, 32 F.3d 1085 (7th Cir. 1994). In the Fifth Circuit, a resident who crosses the border without inspection is not deportable unless the crossing was an "entry" within the meaning of *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). See *supra* note 31. But in the Seventh Circuit, the *Fleuti* entry doctrine will not apply to any alien in deportation proceedings for entering without inspection. See *Rosendo-Ramirez*, 32 F.3d at 1090.

¹⁶⁵ Motomura writes:

Many of the immigration cases of the past decade reflect a broad effort by aggrieved aliens and their sympathizers to make up for a century of inactivity by exposing congressional and executive agency decisions to the judicial scrutiny that we have come to take for granted in other areas of law.

Motomura, *supra* note 18, at 1627.

in his petition for writ of certiorari that “[a] proper development of immigration law with respect to venue of hearings and right to counsel requires that the Court answer the question posed by this case.”¹⁶⁶

Just what process is due the alien in deportation proceedings? Just what are the essential standards of fundamental fairness for the alien? The Supreme Court has yet to clarify the parameters of the resident alien’s due process rights, and the lower courts are not picking up the slack.¹⁶⁷

Gandarillas-Zambrana provided the Fourth Circuit an opportunity to live up to the promise of fundamental fairness. It was an opportunity to further the evolution of immigration law into the mainstream of constitutional law, but the court declined.

V. CONCLUSION

Gandarillas-Zambrana v. Board of Immigration Appeals represents the Fourth Circuit’s willful blindness to the reality of the situation faced by immigrants in remote detention centers. The decision harkens back to a day when the plenary power doctrine made little exception for procedural due process. After *Plasencia*, the immigrant’s right to due process is informed by the balancing test applicable to other areas of administrative law. When the courts take a hard look at the liberty interest hanging in the balance, the INS claims of administrative efficiency should be seen for what they are: an infringement on the alien’s right to counsel and procedural due process. Therefore, the INS policy of transferring aliens to locations where the aliens have no contacts and little opportunity to obtain counsel and present evidence should stop.

¹⁶⁶ Petition for Writ of Certiorari at 6, *Gandarillas-Zambrana* (No. 94-1720).

¹⁶⁷ See Ray D. Gardner, Note, *Due Process and Deportation: A Critical Examination of the Plenary Power and the Fundamental Fairness Doctrine*, 8 HASTINGS CONST. L.Q. 397, 398–99 (1981) (arguing that the amorphous Supreme Court jurisprudence has led to confusion, and in some jurisdictions aliens are found to have been denied due process only in cases of extreme injustice, whereas in other jurisdictions, mere prejudice is a violation of due process).

